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Senate

Statement of Senator Dianne Feinstein

- on Flag Protection Amendment-

Mrs. FEINSTEIN. Mr. President, I rise as the main Democratic sponsor of this amendment. I have given this a lot of thought for a long time. I believe what we have before us is language that is essentially content neutral. It is on conduct -- not speech. I will make that argument later on in my remarks, but I begin my remarks with how I came to believe that the American flag is something very special.

For those of us who are westerners, the Pacific battles of World War II had very special significance.

Reporters were not embedded, there was no television coverage, and the war in the Pacific was terrible -- island battle after island battle -- the death march at Guadalcanal, Tarawa, and onward.

On the morning of February 24, 1945, I was a 12-year-old. I picked up a copy of the San Francisco Chronicle. There on the cover was the now iconic photograph done by a Chronicle photographer by the name of Joe Rosenthal, and it was a photograph of U.S. marines

struggling to raise Old Glory on a promontory, a rocky promontory above Iwo Jima.

For me -- at that time as a 12-year-old -- and for the Nation, the photo was a bolt of electricity that boosted morale amidst the brutal suffering of the Pacific campaign.

The war was based on such solid ground and victory was so hard-pressed that when the flag unfurled on the rocky promontory on Iwo Jima, its symbolism of everything courageous about my country was etched into my mind for all time. This photo cemented my views of the flag for all time.

In a sense, I think, our flag is the physical fabric of our society, knitting together disparate peoples from distant lands, uniting us in a common bond, not just of individual liberty but also of responsibility to one another.

Supreme Court Justice Felix Frankfurter called the flag, "The symbol of our national life." I, too, have always looked at the flag as the symbol of our democracy, our shared values, our commitment to justice, our

remembrance to those who have sacrificed to defend these principles.

For our veterans, the flag represents the democracy and freedom they fought so hard to protect. Today there are almost 300,000 troops serving overseas, putting their lives on the line every day to fight for the fundamental principles that our flag symbolizes.

The flag's design carries our history. My proudest possession is a 13-star flag. When you look at this flag, now faded and worn, you see the detail of the 200 year old hand stitching -- and the significance of every star and stripe.

The colors were chosen at the Second Continental Congress in 1777. We all know them well: Red for heartiness and courage; white for purity and innocence; blue for vigilance, perseverance, and justice. Even the number of stripes has meaning -- thirteen for thirteen colonies.

Our flag is unique not only in the hearts and minds of Americans, but in our laws and

customs as well. No other emblem or symbol in our Nation carries with it such a specific code of conduct and protocol in its display and handling.

For example, federal law specifically directs that the flag should never be displayed with its union down, except as a signal of dire distress or in instances of extreme danger to life or property.

The U.S. flag should never touch anything beneath it: neither ground, floor, water, or merchandise. The flag must be lit at night. It should never be dipped to any person or thing. And the flag should never be carried horizontally but should always be carried aloft and free.

The flag flies over our government buildings throughout the country. It flies over our embassies abroad, a silent but strong reminder that when in those buildings, one is on American soil and afforded all the protections and liberties enjoyed back home.

Last December, I traveled to Iraq and met with some of the brave men and women in the armed forces that are serving there. We flew out of Baghdad on a C-130 that we shared with a flag-draped coffin accompanied by a military escort.

The young man or woman in that coffin gave their life under the banner of this flag.

In 1974, Justice Byron White wrote that:

“It is well within the powers of Congress to adopt and prescribe a national flag and to protect the unity of that flag [T]he flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes.”

Justice White continued:

“[T]here would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a monument, subject to similar protection.”

I echo the opinion of Justice White: “The flag is itself a monument, subject to similar protection.”

The American flag is our monument in cloth.

The flag flying over our Capitol Building today, the flag flying over my home here and in San Francisco, each of these flags, separated by distance but not symbolic value, is its own monument to everything America represents. And it should be protected as such.

There is a sturdy historical and legal foundation for special protection for the flag. Constitutional scholars as diverse as Chief Justices William Rehnquist and Earl Warren and Associate Justices Stevens and Hugo Black have vouched for the unique status of the national flag.

On June 14, 1777, the Continental Congress passed the first Flag Act: “Resolved, That the flag of the United States be made of thirteen stripes, alternate red and white; that the union be thirteen stars, white in a blue field, representing a new Constellation.”

Historically, the flag has been protected by statute. In 1989, 48 of our 50 states had statutes restricting flag desecration. However, that protection ended in 1989.

That year the Supreme Court, by a vote of 5 to 4, struck down a Texas State law prohibiting the desecration of American flags in a manner that would be offensive to others in the *Texas v. Johnson* case.

Although the Court held that the government has “a legitimate interest in making efforts to ‘preserv[e] the national flag as an unalloyed symbol of our country,’” it nevertheless concluded that burning the flag constituted speech under the First Amendment, and that the Texas statute outlawing flag desecration was an impermissible regulation of the content of a person’s speech.

Supreme Court Justice John Paul Stevens wrote in his dissent in *Johnson* that the flag is “a symbol of our freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.”

I agree with Justice Stevens.

In response to the *Johnson* case, Congress passed the Flag Protection Act of 1989, which sought to ban flag desecration in a “content-neutral” way that would be permitted by the Courts. Nevertheless, the Supreme Court struck down that federal statute as well.

In that case, *United States v. Eichman*, the Supreme Court, by another 5 to 4 vote, held that although the federal statute prohibiting flag desecration did not limit speech based on content, which had been found unconstitutional in *Johnson*, the statute still violated the First Amendment because Congress’ intent in passing the statute was “related to the suppression of free expression.”

The Supreme Court has spoken, and I do not wish to quarrel with its decisions.

However, the *Johnson* and *Eichman* decisions make it clear that without a Constitutional Amendment no federal statute protecting the flag will survive judicial review.

Consequently, the only avenue available for restoring protection to the flag is to amend the Constitution. Otherwise, any legislation passed by Congress or state legislatures will simply be struck down.

The Constitution itself prescribes instructions for its amendment when necessary for the good of the nation. And the Constitution is, after all, a living

text that has been amended 27 times since its creation.

I do not take amending the Constitution lightly. It is a serious business and we need to tread carefully. However, the change we seek to make is narrow, it is limited, and it is necessary.

Some critics say we must choose between trampling on the flag and trampling on the First Amendment. I strongly disagree.

The freedom of speech enshrined in the First Amendment is a cornerstone of our great nation.

However, there is no idea or thought expressed by the burning of the American flag that cannot be expressed equally well in another manner. While I might disagree with those who protest, I defend their right to do so.

Protecting the flag will not prevent anyone from expressing his or her point of view, regardless of what that point of view may be.

Indeed, the Supreme Court has recognized many instances in which speech is not protected, such as obscenity and “fighting words.” I believe that desecrating an American flag falls into the same category.

Limiting this very specific **conduct** will leave both the flag and speech safe.

Amending the Constitution for this narrow and necessary purpose is an implicit

recognition of the depth and breadth of the First Amendment. What could more clearly signal the scope and strength of our freedom of speech than the fact that even protecting our nation’s symbol from desecration requires a Constitutional Amendment?

I would like to assure those with reservations about amending the Constitution that the path we are taking is no slippery slope.

There will be no stampede of Constitutional Amendments that could erode our freedom of speech. There will be no litany of restrictions.

There has been much confusion surrounding this Amendment.

It does not prohibit flag burning, as is so often stated. This amendment would, quite simply, enable the Congress -- you and I and our 98 other Members, Mr. President, as well as the 435 Members of the House of Representatives, and the President of the United States -- to set the protocols governing our flag and protecting it as it has been protected throughout most of this Nation's history.

In other words, we will hold hearings. We will devise legislation. We will debate that legislation on the floor of both bodies. The purpose is to enable this body and the other body to establish a protocol for the handling of the American flag. No more, no less. It is content neutral. It does not ban

desecration, burning, defiling,
or anything else.

Let me read the text of the
amendment:

*“The Congress shall
have the power to prohibit
the physical desecration of
the flag of the United
States.”*

Just as 48 States debated
this prior to 1989, and just as 48
States made a decision and
passed legislation, the Congress
of the United States would now
have the power.

That’s it. No more. No
less.

The resolution -- if passed
by three-quarters of the 50 State
legislatures -- would merely
return to Congress its historical
power to prohibit the physical
desecration of the flag.

The Amendment will enable
Congress to have a full and fair
debate on the appropriate
protections for the flag.

As President Woodrow
Wilson, who proclaimed the
first Flag Day in 1916, said:

*“This flag, which we
honor and under which we
serve, is the emblem of our
unity, our power, our
thought and purpose as a
nation. It has no other
character than that which
we give it from generation
to generation. . . Though
silent, it speaks to us--
speaks to us of the past, of
the men and women who
went before us, and of the*

*records they wrote upon
it.”*

In honor of this emblem of
America, I ask that this body
permit us to give the American
people the opportunity to decide
if the Constitution should be
amended. It is time to let the
people decide.